SUPREME COURT U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

No. 74-953

UNITED STATES OF AMERICA,
Respondent,

v.

FRANK SCHULLO and ANTHONY PETRANGELO,
Petitioners.

PETITION FOR WRIT OF CERTIORARI

To the United States Court of Appeals for the Eighth Circuit

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INDEX

	Page
Introductory Paragraph	1
Opinion Below	2
Jurisdiction	2
Questions Presented	2
Constitutional and Statutory Provisions Involved	3
Statement of the Case	4
Reasons for Granting the Writ	9
Conclusion	20
Appendix A	A-1
Appendix B	A-13
Appendix C	A-29

Cases Cited

Bell v. United States, 349 U.S. 81 (1955)	19
Cline v. Frink Dairy Co., 274 U.S. 445 (1927)	18
Cohen v. United States, 378 F.2d 751 (9th Cir. 1967)	11
Connally v. General Construction Co., 269 U.S. 385 (1926)	18
Farmer v. United States, 128 F.2d 970 (10th Cir. 1942)	18
F.C.C. v. National Broadcasting Co., 347 U.S. 284 (1953)	19
France v. United States, 164 U.S. 676 (1897)	19
Gesell v. United States, 1 F.2d 283 (8th Cir. 1924)	18
Jacobs v. United States, 359 F. 2d 960 (8th Cir. 1966)	19

Lanzetta v. New Jersey, 306 U.S. 451, 453 (1939) 18

Martyn v. United States, 176 F. 2d 609 (8th Cir. 1949) 19

Rewis v. United States, 401 U.S. 808 (1971) 19

Smith v. United States, 360 U.S. 1 (1959) 19

Toussie v. United States, 397 U.S. 112 (1970) 19

United States v. Bowdach, 474 F.2d 812 (5th Cir. 1973) 10

United States v. Brick, 502 F. 2d 219 (8th Cir. 1974) 10

United States v. Chavez, — U.S. —, 94 S. Ct. 1849 (1974) 2, 9

United States v. Cohen Grocery Co., 255 U.S. 81 (1921) .. 18

United States v. Grosso, 390 U.S. 62 (1968) 16

United States v. Halseth, 342 U.S. 277 (1951) 19

United States v. Hariss, 347 U.S. 612 (1954) 18

United States v. Resnick, 299 U.S. 207 (1936) 19

United States v. Robinson, 468 F.2d 189 (5th Cir. 1973) 10

United States v. Schaefer, No. 73-1506 (8th Cir. Jan. 3, 1975) 12, 17, 18

United States v. Schullo, 363 F. Supp. 246 (1973) 8

United States v. Thomas, et al., — F.2d — (filed Jan. 3, 1975) 10-11

United States v. Universal Corp., 344 U.S. 218 (1952) .. 19

United States v. Wolk, 466 F.2d 1143 (8th Cir. 1973) 4

Statutes Cited

18 U.S.C. Section 371 4

18 U.S.C. Section 1952 19

18 U.S.C. Section 1955 ..... 2, 3, 12, 13, 16, 17, 20

26 U.S.C. Section 6419(b) 16
26 U.S.C. §§ 4401 et seq. 16
28 U.S.C. Section 1254(1) 2
28 U.S.C. Section 2516 3
28 U.S.C. Section 2518(10)(a) 3, 11
United States Constitution, Fifth Amendment 4
United States Constitution, Tenth Amendment 4

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INTRODUCTORY PARAGRAPH

Petitioners pray that a Writ of Certiorari issue to review the judgment and opinion of the Eighth Circuit Court of Appeals, entered in this case on January 3, 1975, affirming the judgment of conviction of the United States District Court for the District of Minnesota entitled United States of America v. Frank Schullo et al., entered July 6, 1973.

OPINION BELOW

The opinion of the Eighth Circuit Court of Appeals has not yet been printed. A copy of said opinion is set forth in the appendix of this petition. The opinion of the District Court is reported at 363 F. Supp. 246 (D. Minn. 1973) (Appendix B).

JURISDICTION

The opinion of the Eighth Circuit Court of Appeals was entered on January 3, 1975. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. Section 1254(1).

QUESTIONS PRESENTED

1. Whether this Court's opinion in *United States v. Chavez*, — U.S. —, 94 S. Ct. 1849 (1974), forecloses an evidentiary hearing to determine whether a wiretap application was in fact authorized by the Attorney General, where an offer of proof has been made that the affidavit of former Attorney General Mitchell, relied on by the government to establish that such authorization was given, is false.

2. Whether due process of law and congressional intent is violated by holding that several individual bookmakers, who do not know one another, who do not share telephones, customers, profits or losses, or maintain any specific accounting among one another, fuse themselves into a single illegal gambling business involving five or more persons as proscribed by 18 U.S.C. Section 1955 by merely exchanging line information or making layoff bets with a common source?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. Title 18 U.S.C. Section 1955 provides:

"(a) Whoever conducts, finances, manages, supervises, directs or owns, all or part of an illegal gambling business. . . .

"(b) As used in this section—

"(1) illegal gambling business means a gambling business which—

* * *

"(ii) involves five or more persons who conduct, finance, manage, supervise, direct or own all or part of such business."

2. Title 18 U.S.C. Section 2516 provides:

"(1) The Attorney General or any Assistant Attorney General specially designated by the Attorney General, may authorize an application. . . ."

3. Title 18 U.S.C. Section 2518(10)(a) provides:

"(a) Any agreed person . . . may move to suppress the contents of any intercepted wire or oral communication, or evidence derived therefrom on the grounds that—

"(i) the communication was unlawfully intercepted;

"(ii) the order of authorization or approval under which it was intercepted is insufficient on its face; or

"(iii) the interception was not made in conformity with the order of authorization or approval."

4. The Fifth Amendment to the United States Constitution provides:

> "No person shall . . . be deprived of life, liberty, or property, without due process of law. . . ."

5. The Tenth Amendment to the United States Constitution provides:

> "The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people."

STATEMENT OF THE CASE

Frank Schullo and Anthony Petrangelo were indicted along with fifteen other defendants for various gambling violations, these appellants being charged in only two counts: Count I, for violation of 18 U.S.C. § 371, conspiracy to engage in an illegal gambling business and, Count II, for the substantive offense of engaging in an illegal gambling business in violation of 18 U.S.C. § 1955.

Numerous pre-trial motions were filed and heard, including motions for severance of defendants (Transcript of September 9, 1971, pp. 54-63) and severance of offenses (Ibid., p. 84 et seq.); motions attacking the constitutionality of the gambling business statute (Transcript of September 17, 1971) and of the wiretapping statute (Ibid., p. 34); and a motion to suppress wiretap evidence (Transcript of August 4, 1972), which was granted, appealed to this Court by the Government, and reversed *sub nom United States v. Wolk*, 466 F.2d 1143 (8th Cir. 1973). Thereafter a renewed motion to suppress and request for evidentiary hearing concerning the Attorney General's authorization for the wiretap was heard and denied. (Transcript of April 25, 1973).

When the matter came on for trial on April 30, 1973, only six of the original defendants remained, Appellants Schullo and Petrangelo, and Messrs Finkelstein, Scherer, John Thomas and Steve Thomas. The case against Scherer was dismissed on May 1, 1973, when the Government's witness revealed he could not identify Scherer's voice despite his earlier identification thereof. (Vol. B, 25 et seq.)[1]

The Government's evidence in this rather complex prosecution consisted primarily of recordings of conversations between the various persons and Messrs Wolk, Capra and Fishman, who admittedly conducted a bookmaking operation in Minneapolis, Minnesota; their telephones were tapped pursuant to a warrant which was the subject of the earlier appeal in *United States v. Wolk, supra.* Federal Bureau of Investigation Agent Richard Anderson described the wiretapping procedures (Vol. B, 4-16), and testified that he was able to identify the voices of the defendants including Schullo and Petraneglo. (Vol. B, 34-35, 39-40, 58, 61; Government Exhibits 11, 13, and 14) Tape recordings of selected conversations were played for the jury. (Vol. B, 83, Vol. C, 25, 44) Anderson admitted that of the thousands of telephone calls monitored and recorded only seventeen were attributable to Schullo (Exhibit 14) and thirty-eight to Petrangelo (Exhibit 18). (Vol. D, 16)

FBI Agent Theodore Whitcomb, a gambling specialist, testified that his examination of the wiretapped conversations and the documents seized from the Wolk premises lead him to the opinion that a bookmaking business was being conducted there, by Wolk, Capra and Fishman (Vol. E, 50, Vol. G, 12), and that

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[1] The trial transcript is in various volumes designated A, B, C, D, D-1, E, F, G and H and will be referred to by volume letter and page number. The final two volumes containing the proceedings on May 14, 1973 and May 15, 1973, carry no letter designation and will be referred to by date and page number. The testimony of Government witnesses Whitcomb and Cook taken on May 1, 1973, is transcribed in separate volumes and will be referred to as Whitcomb Transcript (W.T.) and Cook Transcript (C.T.).

on two days the "dollar volume" of bets was at least $25,000 and $7000 respectively. (Vol. E, 50) He identified various Government exhibits seized from Wolk as documents such as "markers" and "bottom sheets", used in bookmaking. (Vol. E, 53-63) Among the "markers" were a number on which the notation "lay off" or "lay" had been written by the bookmakers, but these "markers" all identified the customers as persons other than Schullo or Petrangelo. (Vol. E, 125-130)

Whitcomb offered the opinion that the phone calls between the Wolk business and Petrangelo ("Tony" on the Transcripts), and Schullo (or "Cheech") were "indicative" of two bookmakers talking with one another. (Vol. E, 76, 114-116) He was also of the opinion that "lay off" bets were made during some of these conversations, (Vol. E, 83 et seq., 101, 102), but this opinion was based upon the "overall . . . relationship" between the parties to the conversation, (Vol. E, 85), since he admitted there were no explicit references to "lay off" bets in these conversations. (Vol. E, 79, 87) He conceded as well that bookmakers can and do place personal, non-"lay off" bets with each other, (Vol. E, 78, Vol. G, 23), and that bettors who are not bookmakers may pool their resources and place their bets to the bookmaker through one of their group. (Vol. E, 135) And Whitcomb admitted that it is often difficult or impossible to determine whether a given call is between two bookmakers or between a mere bettor and a bookmaker, since bettor and bookmaker may use the same language. (Vol. E, 137-138)

A report by Whitcomb on the items seized from the Volk offices stated that it could not be determined how many persons were involved. (Vol. G, 11, 75) Whitcomb also acknowledged that bookmakers may either compete with or cooperate with one another, and that if they in cooperation or working together they would use the same "line" or odds. (Vol. G, 78, 92) The evidence showed, however, that the "line" which was being used by Wolk-Capra and that being used by Schullo-Petrangelo were

in fact quite different: the conversations of February 20, 1971, for example, (Exhibit 18, calls of 12:22, 12:29 and 12:33 p.m.), show that of seventeen contests discussed, the lines differed on twelve events. (Vol. G, 80 et seq.) and Whitcomb admitted that one bookmaker could not effectively protect himself by "lay off" bets with another bookmaker whose "line" was different. (Vol. G, 93)

The Government called two witness, Michael McCalla and George Cook, both of whom had been included as defendants in the original indictment, but whose cases had been dismissed. (Vol. F, 27, Cook Transcript, hereafter C.T., 8) McCalla testified that he and John Thomas and one Smith were bettors and placed bets with the Wolk bookmaking operation. (Vol. F, 22) He admitted he did not know either Schullo or Petrangelo. (Vol. F, 30) Cook, a St. Paul bar owner, testified that he also placed bets with Wolk-Capra for himself and others, for which he was sometimes paid a commission. (C.T., 5, 8) He, too, did not know either Schullo or Petrangelo. (C.T., 7)

William Wolk, one of the original defendants who had plead guilty earlier, was called as a defense witness. (Vol. H, 87) Wolk admitted that he had in fact operated the bookmaking business alleged by the Government (Vol. H, 88), but he testified that Schullo and Petrangelo were not members of his organization, that he never discussed his operation with them, that although he had gotten the "line" from them he had not exchanged line information with them, and that although he placed bets with them these were not "lay off" bets. (T., May 14, 4-8) He said he had never allowed his employees to bet with his book. (T., May 14, 6)

John Capra, who worked for Wolk, and had also plead guilty, testified as a defense witness, as well. (T., May 14, 32) He, too, admitted being a bookmaker and that he placed personal bets with Schullo and Petrangelo. (T., May 14, 33, 41)

But like Wolk he denied placing any "lay off" bets with them and, significantly, he testified that he always noted "lay off" on the "marker" when a "lay off" bet was received, but no such notation appeared on the Petrangelo "markers." (T., May 14, 43-45) He confirmed that no employee of Wolk could bet with him (T., May 14, 40), and denied placing any "lay off" bets with Schullo and Petrangelo. (T., May 14, 41) Both Capra and Wolk denied that Schullo or Petrangelo in any way conducted, financed, managed, supervised, directed or owned any part of their bookmaking business. (T., May 14, 31, 41) No connection was shown between Schullo-Petrangelo and the co-defendants except for their relationship with the Wolk-Capra bookmaking enterprise.

All charges against Finkelstein were dismissed and judgment of acquittal entered at the close of the Government's case, as was the conspiracy charge as against all remaining defendants. (Vol. H, 20 et seq.) John Thomas was acquitted of the substantive offense, and the three remaining defendants, Schullo, Petrangelo and Steve Thomas were convicted. A motion for a judgment of acquittal or a new trial was denied by order dated June 21, 1973. *United States v. Schullo,* 363 F. Supp. 246 (1973). These appellants were both sentenced on July 6, 1973 to three years in custody of the Attorney General, probation after six months, and fined $5000. The Eighth Circuit Court of Appeals affirmed both convictions. See opinion at Appendix A. Both were continued on bail pending appeal.

REASONS FOR GRANTING THE WRIT

I

This Court's Decision in *U.S. v. Chavez, Supra*, Does Not Preclude an Evidentiary Hearing Where Challenge Has Been Made to the Truth of an Affidavit Relied Upon by the Government to Prove That a Wiretap Application Was Authorized by the Attorney General.

The denial of an evidentiary hearing would reduce to a nullity the protections built into the wiretap authorization procedure. In addition, there is a conflict in the circuit courts as to whether an accused is entitled to an evidentiary hearing where the wiretap authorization procedure is challenged by a motion to suppress.

The wiretap authorization procedure involved here is the same as in *Chavez*. However, unlike *Chavez* the petitioners specifically objected to the government's use of Mr. Mitchell's affidavit to establish that he had in fact authorized the application rather than designating an assistant to do so, and requested an evidentiary hearing to challenge its truthfulness. An offer of proof was made that an evidentiary hearing would establish that Mr. Mitchell did not authorize the application for the wiretap. It was pointed out that the "authorization" by Mr. Mitchell was alleged to have occurred on the same day as his memorandum to Assistant Will Wilson, the receipt of the memorandum by Assistant Henry Peterson and his letter to Assistant District Attorney Earl Cudd in Minneapolis, and finally, the presentation to Judge Devitt and his resulting order. Indeed Mr. Mitchell's memorandum designating Wilson to assume the authorization powers of the attorney general itself contradicts the self serving allegation in the affidavit that Mr. Mitchell authorized the application.

No challenge was made to the Mitchell affidavit in *Chavez*, where this Court expressly set forth the requirement that the government "clearly establish" that the attorney general authorized the application. However, because no challenge to the affidavit was made, this Court assumed that the attorney general had in fact authorized the application and went on to decide the identity issue.

Petitioners submit that the recent conviction of Mr. Mitchell on two charges of perjury before a federal grand jury support their claim that an evidentiary hearing should have been ordered upon the challenge to Mr. Mitchell's affidavit. One of the acts of perjury for which Mr. Mitchell was convicted occurred only three weeks before he executed the "cure all" affidavit in the instant case. Mr. Mitchell's subsequent conviction is frightening proof that an accused must have an opportunity to challenge an affidavit that goes to the very question of whether the wiretap was authorized at all.

While the Eighth Circuit has denied the right to an evidentiary hearing, the opposite result has been reached by the Fifth Circuit Court of Appeals. In *United States v. Robinson*, 468 F. 2d 189 (5th Cir. 1973) and *United States v. Bowdach*, 474 F. 2d 812 (5th Cir. 1973), the Fifth Circuit Court of Appeals remanded for evidentiary hearing to determine whether Mr. Mitchell himself authorized the applications or whether he designated an assistant to do so, even though the affidavits indicated Mr. Mitchell's personal involvement. It is noteworthy that at the conclusion of the hearing held on remand the District Court suppressed the evidence obtained in the wiretap.

Nor is there unanimity within the Eighth Circuit Court of Appeals itself. Judge Bright, concurring in *United States v. Brick*, 502 F. 2d 219 (8th Cir. 1974), stated that he would remand for an evidentiary hearing to determine the procedure followed in the authorization process, but felt that *Chavez* precluded such a hearing. Again, in *United States v. Thomas*, et

al., — F. 2d — (filed Jan. 3, 1975) a companion to the instant case. Judge Heaney dissented, stating that *Chavez* did not foreclose a remand for an evidentiary hearing to examine the truth of Mr. Mitchell's affidavit.

Section 2518 (10)(a) of the wiretap statute specifically provides for proceedings to suppress the contents of an intercepted communication. Although the burden of going forward is on the moving party, that burden was satisfied by proof that the signature of Will Wilson was forged and the application and order identified the wrong person authorizing the application. The burden of proof, having then shifted to the government, was not satisfied by affidavits of Mr. Mitchell and others on such crucial issues of fact. Affidavits are not a substitute for competent proof when factual issues are properly raised. *Cohen v. United States*, 378 F. 2d 751 (9th Cir. 1967).

The issue here is not the right to an evidentiary hearing to probe beneath the surface of affidavits offered to support a search warrant or even an application to wiretap. Rather, the affidavit here goes specifically to the issue of whether the government could have conducted the wiretap at all. *Chavez* does not preclude an evidentiary hearing when such an affidavit has been challenged. To so interpret that case would eliminate the requirement that the attorney general or one designated by him authorize the application, without which provision the wiretap statute would not be constitutional.

II

Due Process of Law and Congressional Intent Is Violated by Holding That Several Individual Bookmakers, Who Do Not Know One Another, Who Do Not Share Telephones, Customers, Profits or Losses, or Maintain Any Specific Accounting Among One Another, Fuse Themselves Into a Single Illegal Gambling Business Involving Five or More Persons as Proscribed by 18 U.S.C. Section 1955 by Merely Exchanging Line Information or Making Layoff Bets With a Common Source.

The holding of the Eighth Circuit Court of Appeals in this case has, contrary to congressional intent, broadened the federal government's criminal enforcement power so as to rival the power of the states to regulate localized gambling operations. The decision also stretches the plain meaning of the ordinary words in 18 U.S.C. Section 1955 to encompass activity that persons of common intelligence never would have ascribed to it, thus violating fundamental principles of due process of law. Two Judges of the Eighth Circuit have dissented in separate cases[2] from the majority's interpretation of the statute. This Court should grant the writ so that federal jurisdiction will not go beyond what was intended by Congress, and so that fundamental principles of due process of law will be vindicated.

Congressional Intent

It is appropriate to examine the vision of the Congress in enacting Section 1955, for this statute had a very specific and important purpose: to punish the massive syndicated gambling operations of organized crime—to wit, the Mafia, Cosa Nostra, and similar underworld institutions.

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[2] Judge Heaney dissented in this case, adopting Judge Lay's dissent in *United States v. Schaefer*, No. 73-1506 (8th Cir. Jan. 3, 1975), reprinted in Appendix C.

The intent in enacting Section 1955, as spelled out by the Congress, was

> not to bring all illegal gambling activity within the control of the Federal Government, but to deal only with illegal gambling activities of major proportions. It is anticipated that cases in which their standards can be met will ordinarily involve business type gambling operations of *considerably greater magnitude than simply meet the minimum definitions*. . . . It is intended to reach only those persons who *prey systematically upon our citizens* and whose syndicated operations are *so continuous and so substantial as to be of national concern*, and those corrupt state and local officials who make it possible for them to function. 2 U.S. Cong. & Adm. News, 1970 at 4029. (Emphasis supplied.)

In dismissing a gambling business indictment because of an unlawful wiretap, Judge Kaess reviewed the expressed legislative purpose of The Organized Crime Control Act of 1970 as follows:

> The Court notes in passing that, when Congress enacted "The Organized Crime Control Act of 1970," it was concerned with organized large-scale illegal activities. Congress found that "(1) organized crime is a highly sophisticated diversified and widespread activity that annually drains billions of dollars from America's economy by unlawful conduct and the illegal use of force, fraud and corruption; (2) organized crime derives a major portion of its power through money obtained from such illegal endeavors as syndicated gambling, loan sharking, the theft and fencing of property, the importation and distribution of narcotics and other dangerous drugs, and other forms of social exploitation; (3) this money and power are increasingly used to infiltrate and corrupt legitimate business and labor unions and to subvert and corrupt our democratic processes; (4) organized crime activities in the United States weaken the

stability of the Nation's economic system, harm innocent investors and competing organizations, interfere with free competition, seriously burden interstate and foreign commerce, threaten the domestic security, and undermine the general welfare of the Nation and its citizens; and (5) organized crime continues to grow because of defects in the evidence-gathering process of the law inhibiting the development of the legally admissible evidence necessary to bring criminal and other sanctions or remedies to bear on the unlawful activities of those engaged in organized crime and because the sanctions and remedies available to the Government are unnecessarily limited in scope and impact." U.S. Code Cong. & Adm. News, Public Law 91-452, p. 1073 (1970).

He then added *obiter*, apropos the case before him:

A review of the indictment in this case indicates to the Court that this case does not appear to be the large octopus-like operation contemplated by Congress when it enacted the organized Crime Control Act of 1970. All of the activities alleged in the indictment appeared to be purely local in nature.

The federal Government should be reluctant to encroach on areas which have traditionally been left to the States. Younger v. Harris, 401 U.S. 37, 8 CrL 3103. In these areas which affect the federal-state relationship, the utmost care should be exercised. Many times in the past federal criminal prosecutions have been struck down when proof of a nexus with interstate commerce has not been established. U.S. v. Bass, 40 L.W. 4101 (December 20, 1971). It seems to the Court that the present case runs dangerously close to the border line between the State and Federal governments. The Government should be very careful not to misuse the power given to it by the organized Crime Control Act of 1970. If it were to prosecute every

illegal gambling operation which was brought to its attention, it would severely tax the federal police resources. *United States v. Wierzbicki* (E.D. Mich. Sept. 15, 1972), reported to date only in 12 Criminal Law reporter 1075, 1076.

Congress specifically and deliberately excluded mere bettors, or customers of bookmakers, from this legislation's proscription:

> As originally drafted Title VIII of Senate Bill 30 which became the Organized Crime Control Act of 1970 defined an illegal gambling business as one which "involves five or more persons who *participate* in the gambling activity." (Emphasis added.) This language was criticized because it might include mere bettors. [citations omitted] The House Amendment, which became law, substituted "conduct, finance, manage, supervise, direct, or own" for "participate." The House Judiciary Committee Report explains:
>
> > "The term 'conducts' refers both to high level bosses and street level employees. It does not include the player in an illegal game of chance, nor the person who participates in an illegal gambling activity by placing a bet." House Report at 53,
>
> 2 U.S. Code Cong. & Admin. News 1970 at p. 4029. *United States v. Riehl*, 460 F.2d 454, 459 (3rd Cir. 1972) (emphasis supplied.)

Thus, the five or more persons whose functions are explicitly referred to must be actually involved in the gambling business either as directors or owners (as those terms are commonly understood) or as employees or agents of the directors and owners—"runners," card dealers, cooks, watchmen, doormen, bookkeepers, bet-takers, relayers of line information, corrupt officials "protecting" the business, and so on. While it may

strain the common meaning of the term "conduct" to include the more lowly of these employees, the legislative history seems to contemplate their inclusion. This is perfectly logical, since such employees are obviously essential, more or less, to the conduct of the business, and their interests are entirely consistent with those of their superiors and the business itself. Conversely, it is universally agreed, also in view of the legislative history, that mere customers cannot be included. But between the directors and employees of the business, and the "mere" bettor, the government theorizes, falls the layoff bettor, or the bookmaker-customer of the gambling business who bets to offset his own losses.

It is important to note that Congress is not without knowledge of "layoff" betting. The 82nd Congress in 1951 enacted 26 U.S.C. Section 6419(b)[3] regarding excise taxes on wagering, which provided for tax credits on layoff wagers. The legislative history of that statute discussed the meaning, terminology and purpose of layoff betting. See House Report, 2 U.S. Code Cong. & Admin. News 1951 at pp. 1841-1842. The history of this moribund law is especially pertinent here for two interrelated reasons: it shows unequivocally that Congress was well-informed upon the subject of layoff betting and yet made no reference to it in Section 1955, and, most importantly, Congress' expressed understanding of this process clearly distinguishes the bookmaker as such, who accepts wagers and is taxed for them, and the bookmaker as a layoff bettor, who is entitled to a tax credit. In view of this, it surely cannot be said that when they enacted Section 1955 Congress intended sub silentio to combine the two distinct entities which they so carefully separated in the earlier statute.

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[3] This section, which depends upon Chapter 35 (26 U.S.C. §§ 4401 et seq.), is probably moot since the wagering tax provisions were generally held unconstitutional; *United States v. Grosso*, 390 U.S. 62 (1968).

The decisive significance of the omission of layoff betting from the present Section 1955 is underscored, as well, by this: The President's Version of the Revised Federal Criminal Code has redrafted the statute to include layoffs quite explicitly:

> Sec. 1831. Engaging in a Gambling Business.
>
> (a) Offense. A person is guilty of an offense if he:
>
> (1) owns, controls, manages, supervises, directs, conducts, finances, or otherwise engages in a gambling business; or
>
> (2) receives lay-off wagers or otherwise provides reinsurance in relation to persons engaged in gambling. 13 Cr. L. at 3015.

If the President thought it necessary to add receiving of layoff wagers to the statute, the implication is clear that this is not included now in the statute; a fortiori the placing of layoff wagers is not included in a Section 1955, for (*exclusio unius est exclusio alterius*) placing layoff wagers is not even included in the expanded version. For a more detailed and articulate discussion of the legislative history of Section 1955 see Judge Lay's dissent in *United States v. Schaefer*, No. 73-1506 (8th Cir. Jan. 3, 1975), in Appendix C hereto.

Due Process and Statutory Construction

Section 1955 is penal legislation, creating a crime *malum prohibitum* of rather more than usual specificity. Yet the description of the prohibited involvement—conduct, finance, manage, supervise, direct or own—is woefully ambiguous in some circumstances, circumstances such as this prosecution. The ambiguity is not really of the Congress' making; it results rather from the evidence which by tortured semantics the government here seeks to manipulate into the shape of one of those opera-

tive words—conduct, finance, etc.—and from the interpretation given by the various courts of appeal.

In this case Judge Bright referred to the term "business" in the statute as "nebulous and elastic in scope." Yet, he proceeded to "find" a narrower definition by examining the same legislative history which led two of his colleagues to a different conclusion. See Judge Heaney's dissent, adopting Judge Lay's dissent in *United States v. Schaefer*, supra (Appendix C).

Living under a rule of law requires that "all [persons] are entitled to be informed as to what the state commands or forbids." *Lanzetta v. New Jersey*, 306 U.S. 451, 453 (1939). *Lanzetta* is one of a well-recognized group of cases insisting that the law give fair notice of the offending conduct. *See Connally v. General Construction Co.*, 269 U.S. 385, 391 (1926); *Cline v. Frink Dairy Co.*, 274 U.S. 445 (1927); *United States v. Cohen Grocery Co.*, 255 U.S. 81 (1921). This statute as interpreted by the government violates the due process requirement of specificity and thus is void for vagueness because it "fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by statute." *United States v. Hariss*, 347 U.S. 612, 617 (1954).

It is a desideratum of criminal jurisprudence that:

> A criminal statute must be strictly construed. . . . Ambiguity in criminal statutes should not be resolved so far as to embrace offenses not clearly within the law. The facts charged and proved must bring the defendant *plainly and unmistakably* within the statute. *Schooler v. United States*, 231 F. 2d 560, 564 (8th Cir. 1956) (emphasis supplied).[4]

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[4] Quoting *Farmer v. United States*, 128 F.2d 970, 972 (10th Cir. 1942) (emphasis supplied.) See also *Gesell v. United States*, 1 F. 2d 283 (8th Cir. 1924).

Justice Butler phrased it thus in *United States v. Resnick*, 299 U.S. 207 (1936):

> Before one may be punished, it must appear that his case is plainly within the statute; there are no constructive offenses.

More recently this Court held in *Rewis v. United States*, 401 U.S. 808, 812 (1971), that the Travel Act (18 U.S.C. Section 1952) could not be read to punish an activity under the commerce clause merely because it was occasionally patronized by customers from another state, reiterating that "ambiguity concerning the *ambit* of criminal statutes should be resolved in favor of lenity."

And, in *Toussie v. United States*, 397 U.S. 112, 122 (1970), the Court said, quoting *United States v. Universal Corp.*, 344 U.S. 218, 221-222 (1952):

> when choice has to be made between two readings of what conduct Congress has made a crime, it is appropriate, before we choose the harsher alternative, to require that Congress should have spoken in language that is clear and definite. We should not derive criminal outlawry from some ambiguous implication.

It is unnecessary to multiply the citations of this axiom, but the principle is important here, even decisive, and it must be borne in mind, together with the expressed legislative intent, in passing upon this record.[5]

If the terms of the gambling statute are admittedly "nebulous and elastic in scope," it is difficult to conceive how men of

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[5] See also *Bell v. United States*, 349 U.S. 81 (1955); *F.C.C. v. National Broadcasting Co.*, 347 U.S. 284 (1953); *Smith v. United States*, 360 U.S. 1 (1959); *France v. United States*, 164 U.S. 676 (1897); *United States v. Halseth*, 342 U.S. 277 (1951); *Martyn v. United States*, 176 F. 2d 609 (8th Cir. 1949); *Jacobs v. United States*, 359 F. 2d 960 (8th Cir. 1966).

ordinary intelligence could use them as guideposts for accepted behavior. Nothing in the language of Section 1955, the legislative history, nor the decisions can justify classifying these persons as conductors of the principal business (and thus felons under Section 1955) rather than mere bettors (and thus exempt). To do so blatantly violates due process by fashioning crime from language ambiguous at best in its application; it violates logic, as embodied in the rules *noscitur a sociis* and *ejusdem generis*. For the layoff bettor's interests conflict with those of the other bookmaker, just as any bettor's do.

CONCLUSION

Wherefore, for the foregoing reasons, petitioners pray that a Writ of Certiorari be granted.

Respectfully submitted

ROBINS, MESHBESHER, SINGER & SPENCE

By RONALD MESHBESHER

APPENDIX

APPENDIX A

United States Court of Appeals
for the Eighth Circuit

No. 73-1490

United States of America,
Appellee,

v.

Steve Thomas,
Appellant.

No. 73-1544

United States of America,
Appellee,

v.

Frank Schullo and Anthony Petrangelo,
Appellants.

Appeals from the United States District Court for the District of Minnesota.

Submitted: February 12, 1974

Filed: January 3, 1975

Before Heaney and Bright; Circuit Judges, and Wangelin, District Judge.*

* H. Kenneth Wangelin, District Judge, Eastern and Western Districts of Missouri, sitting by designation.

Bright, Circuit Judge.

Appellants Steve Thomas, Frank Schullo, and Anthony Petrangelo were tried before a jury in the United States Court for the District of Minnesota (the late Judge Phillip Neville, presiding), and convicted of a single violation of 18 U.S.C. §1955,[1] which prohibits conducting an "illegal gambling business." This appeal followed.

At trial, the Government's evidence consisted primarily of recordings of wiretapped conversations between the appellants and three co-defendants not then on trial—Messrs. Wolk, Capra, and Fishman—who admittedly conducted an illegal "bookmaking" operation in Minneapolis. Based on these telephonic communications and on the physical evidence of gambling paraphernalia found in appellants' possession, the Government painted a picture of the appellants as bookmakers who played an integral part in the conduct of the Wolk book by "laying off" bets and by ex-

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[1] 18 U.S.C. § 1955 provides in relevant part:

(a) Whoever conducts, finances, manages, supervises, directs, or owns all or part of an illegal gambling business shall be fined not more than $20,000 or imprisoned not more than five years, or both.

(b) As used in this section—

(1) "illegal gambling business" means a gambling business which—

(i) is a violation of the law of a State or political subdivision in which it is conducted;

(ii) involves five or more persons who conduct, finance, manage, supervise, direct, or own all or part of such business; and

(iii) has been or remains in substantially continuous operation for a period in excess of thirty days or has a gross revenue of $2,000 in any single day.

(2) "gambling" includes but is not limited to pool-selling, bookmaking, maintaining slot machines, roulette wheels or dice tables, and conducting lotteries, policy, bolita or numbers games, or selling chances therein.

changing "line" information with the Wolk book on sporting events.[2]

On appeal, appellants raise the following issues:

(1) The contents of the intercepted oral communications should have been suppressed because the wiretap application was signed by a Deputy Assistant Attorney General and not Attorney General or his specially-designated Assistant Attorney General as required under 18 U.S.C. §2516:

(2) An evidentiary hearing should have been held to examine the truth of the Attorney General's affidavit in which he asserted that he personally approved a request for authority to apply for a wiretap order by initialing a memorandum to that effect;

(3) The evidence is insufficient to establish that defendants participated in the Wolk gambling business to the

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[2] For the uninitiated, a brief lexicon of gambler's terms may be useful to understanding this case. A "bookmaker," of course, is one who accepts wagers, most commonly on sporting events.

A bettor, in addition to the total bet, pays the bookmaker ten percent, which is the bookmaker's commission, the "vigorish" or "vig" or, sometimes, "juice," in the vernacular. Ideally, a bookmaker has an equal amount wagered on both sides of each event with the result that he has a ten percent profit, less expenses, and ideally, loses nothing. In truth, betting is rarely equal on both sides and bookmakers may lose money, even to the point of their businesses being destroyed.

To protect against losses, a bookmaker normally engages in "lay off" betting whereby he passes on to another bookmaker the amount of bets by which his own "book" is unbalanced; thus to the extent he loses to his own customers, he wins back from the other bookmaker, or vice versa. The "lay off" bet is therefore, in effect, bookmaker's insurance or reinsurance. Bookmakers, however, can and commonly do place personal wagers with one another which are not "lay off" bets.

The "line" constitutes the "odds" or "handicaps" or "point spreads" on the wagered contests. This is a list of the teams and

extent required to sustain a conviction under 18 U.S.C. §1955;

(4) The trial court erred in instructing the jury that a violation of 18 U.S.C. §1955 is established if the Government shows that a defendant who is a bookmaker "exchanges line or other information, or places or accepts layoff bets with another bookmaker;"

(5) The trial court erred instructing the jury that the $2,000 per day gross revenue requirement of 18 U.S.C. §1955(b)(1)(iii) is met by counting the total amount of wagers placed in any single day; and

(6) The statute, 18 U.S.C. §1955, as construed by the trial court: (a) is an illegal Bill of Attainder, (b) is unconstitutionally vague, (c) contravenes the first, fifth, and sixth amendments, (d) is an improper delegation of legislative power under article I, and (e) is an illegal usurpation of power specifically reserved to the states by the tenth amendment.

We find it unnecessary to fully discuss appellant's contentions numbered above as (1), (2), (5), and (6). We agree with the late Judge Neville's excellent discussion and proper determination of these issues in his district court opinion. *United*

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events with a certain number of points attributed to the nonfavored team. To win a bet on the favored team, therefore, that team must win by a score exceeding the point spread given to the nonfavored team. The "line" is subject to change as a given event approaches and a bookmaker may alter the "line" on a particular event in order to try and even out the money wagered on each side.

Bookmakers may cooperate with one another by keeping their "lines" consistent in order to avoid "middling," whereby a bettor, because there are two different point spreads on a single event, may bet and win on both competing teams. Yet bookmakers also compete, and one may use a "beard," or bettor not identifying himself with his principal, to bet heavily with the other in an effort to make a "killing", particularly where "middling" is possible because of a discrepancy in the point spread.

States v. Schullo, 363 F. Supp. 246 (D. Minn. 1973). As to the validity of the wiretap (issue 1), we note that *United States v. Cox*, 462 F.2d 1293 (8th Cir. 1972), on which Judge Neville relied, is in accord with the Supreme Court's decision in *United States v. Chavez*, 94 S.Ct. 1849 (1974), which affirmatively answered the question of whether Justice Department procedures, such as those in the instant case, comply with the wiretap authorization requirements of 18 U.S.C. § 2516. We have discussed this issue extensively in *United States v. Brick*, No. 73-1162 (8th Cir., filed Aug. 15, 1974). Since the initials of Attorney General Mitchell appear on the authorization for the wiretap and his affidavit filed in this case recites that he "approved a request for authority to apply for an interception order in this matter," the appellants' challenge to the wiretap must be rejected as similar challenges were rejected in *Chavez* and *Brick*.

We now turn to a consideration of the sufficiency of the evidence to sustain the conviction of each of the appealing defendants. The statute, 18 U.S.C. § 1955, defines "illegal gambling business" to mean, among other things, an operation which "involves five or more persons who conduct, finance, manage, supervise, direct, or own all or part of such business * * *." As noted, the Government's case rested on transcribed logs of wiretapped conversations between each appellant and the Wolk gambling establishment and on proof that all three defendants were bookmakers.

The appellants strongly argue that the evidence is insufficient to bring them within the purview of the statute.[3] They claim that, even assuming they were laying off bets and giving line information to the Wolk organization, they were not "involved"

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[3] Thomas does not specifically argue insufficiency of the evidence as a reason for reversal of his conviction, but rather adopts the arguments of insufficiency of the evidence made by his co-appellants, Petrangelo and Schullo.

in the "conduct" of the Wolk business. They assert that lay off bets, if actually made, constitute a form of insurance in which one bookmaker passes the risk of loss to another and that the interests of appellants, in fact, directly conflicted with the interests of the Wolk book.

As to Anthony Petrangelo, the taped telephone conversations disclose that he furnished the Wolk book with his "line" (point spreads on various sporting events) and received Wolk's lay off betting on a regular and consistent basis. In addition, the two parties discussed opportunities for Petrangelo to further lay off a particular bet to an unnamed third party bookmaker.

The evidence against Frank Schullo indicates that he frequently called the Wolk operation inquiring of Wolk's line and that he placed bets on selected athletic contests with Wolk on a fairly regular basis. The taped conversations indicate that some bets were lay offs although others may have been either lay offs or personal bets. In addition, the telephonic record indicates that Wolk made frequent lay off bets with Schullo based on Schullo's line.

The evidence shows that Steve Thomas functioned as an intermediary in placing Wolk's bets with an unnamed third party bookmaker. The transcribed conversations establish that Thomas complied with the requests of the Wolk book to obtain the line from the third party bookmaker on frequent occasions. If the odds were deemed favorable, Thomas placed Wolk's bets with this bookmaker. In addition, Thomas placed some of his own personal bets with this same bookmaker.

In examining the insufficiency of the evidence claims we must determine whether the activities of the appellants fall within the statutory term "illegal gambling business." Neither Congress nor the courts have precisely delineated the reach of the term "business" within the phrase "illegal gambling business." Common usage does not offer a precise standard for the word "business"

since it may encompass anything from a single profit-seeking transaction to the overall activity of an entire industry. The statutory requirement that the "business" must involve "five or more persons who conduct, finance, manage, supervise, direct, or own" some portion of the business limits the definition somewhat but still leaves the term nebulous and elastic in scope. Thus, it is necessary to examine the legislative history in order to further narrow the definition.

Section 1955 of Title 18 was enacted as part of the Organized Crime Control Act of 1970.[4] Title VIII of the Act was aimed at syndicated gambling which Congress found to have a pervasive effect upon interstate commerce. 1970 U.S. Code Cong. & Admin. News at 4028. Although Congress, with this special finding, could arguably have proscribed all illegal gambling,[5] it evidently intended by use of the term "business" to signify an organized operation or enterprise involving at least five or more persons similar to a single firm engaged in any other field of commerce. The House Judiciary Committee Report on this portion of the Crime Control Act states:

> The intent of section 1511 and section 1955, below, is not to bring all illegal gambling activity within the control of the Federal Government, but to deal only with illegal gambling activities of major proportions. It is anticipated that cases in which their standards can be met will ordinarily involve business-type gambling operations of considerably greater magnitude than simply meet the minimum

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[4] Organized Crime Control Act of 1970, 84 Stat. 922 (codified in scattered sections of 18 U.S.C.).

[5] A special congressional finding of a familiar nature was used by the Court in *Perez v. United States*, 402 U.S. 146 (1971), as a justification for upholding Title II of the Consumer Credit Protection Act, 18 U.S.C. § 891 *et seq.*, dealing with "loan sharking." *See United States v. Hunter*, 478 F.2d 1019 (7th Cir.), *cert. denied*, 414 U.S. 857 (1973); *Schneider v. United States*, 459 F.2d 540 (8th Cir.), *cert. denied*, 409 U.S. 877 (1972).

> definitions. The provisions of this title do not apply to gambling that is sporadic or of insignificant monetary proportions. It is intended to reach only those persons who prey systematically upon our citizens and whose syndicated operations are so continuous and so substantial as to be of national concern. * * * [H.R. Rep. No. 1549, 91st Cong., 2d Sess. (1970), 1970 U.S. Code Cong. & Admin. News at 4029 (hereinafter "House Report").]

Similarly, the Senate Judiciary Committee Report emphasizes that the standards of § 1955(b)(1) were designed to bring the federal power to bear only against "illegal gambling activities of major proportions."

> It is anticipated that cases in which this standard can be met will ordinarily involve business-type gambling operations of considerably greater magnitude than this definition would indicate, however, because it is usually possible to prove only a relatively small proportion of the total operations of a gambling enterprise. [S.Rep. No. 91-617, 91st Cong., 1st Sess. 73 (1969).]

Thus, given the congressional emphasis on fairly large organized gambling operations and the exclusion of small-scale operations through the five-person minimum, it appears that Congress intended some gambling businesses to remain beyond the scope of the statute. Initially, proposed § 1955(b)(1)(ii) defined "illegal gambling business" to mean in part an operation which "involves five or more persons who *participate* in the gambling activity." (Emphasis added).[6] It was subsequently amended and the bill reported by the House Judiciary Committee contains the final language of § 1955(b)(1)(ii) ("conduct, finance, manage, supervise, direct or own all or part"). House Report at 12-13, 1970 U.S. Code Cong. & Admin. News at

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[6] Hearings on S. 30 and related proposals before Subcom. No. 5 of the House Comm. on the Judiciary, 91st Cong., 2d Sess., ser. 27 at 41 (1970) (hereinafter "House Hearings").

4029. The amendment was apparently the result of objections by the Committee on Federal Legislation of the New York City Bar Association. The word "participate," it was argued, could include even the customers of a gambling business, thereby bringing the federal power to bear against such small scale operations as "Mom and Pop" bookmaking businesses having two owners and three customers. House Hearings at 325-326. The final language was intended to exclude customers from the count of "five or more." House Report at 53, 1970 U.S. Code Cong. & Admin. News at 4029. *See United States v. Riehl*, 460 F.2d 454, 459 (3d Cir. 1972).

Although it is clear that Congress was concerned with large organized gambling operations, it is often difficult to determine whether a particular operation or individual is a part of a large gambling organization. In discussing this problem, Attorney General Mitchell observed:

> In areas in which the criminal syndicates operate, franchises are allocated on a territorial basis to nominally independent bookmakers and numbers operators. * * * The Cosa Nostra, on its part, provides services essential to the conduct of large-scale illegal gambling—such as providing the capital needed for *"laying off"* or re-insuring bets, and arranging for protection from law enforcement agencies—and collects its share of the profits. In an area which organized crime has invaded, there are few independent gamblers. [House Hearings at 152-53 (emphasis added).]

A system of lay off betting constitutes the cement which can weld widely scattered operations into an effective gambling organization. The President's Commission on Law Enforcement and Administration of Justice states:

> Organization is also necessary to prevent severe losses. More money may be bet on one horse or one number with a small operator than he could pay off if that horse or

> number should win. The operator will have to hedge by betting some money himself on that horse or that number. This so-called "layoff" betting is accomplished through a network of local, regional, and national layoff men, who take bets from gambling operations. [*The Challenge of Crime in a Free Society* 189 (1967).]

In evaluating the appellants' claims of insufficiency of the evidence, we are cognizant of the congressional intent to bring federal power to bear against gambling operations organized into a business network and not against small, independent operators. A close examination of the record, including the transcribed conversations, convinces us that the activities of each appellant were of such a nature that a jury could have found that each appellant was involved in a network of gambling operations intertwined with the Wolk business to an extent sufficient to bring them within the purview of 18 U.S.C. § 1955. The activities of both Petrangelo and Thomas played a substantial part in the conduct of the Wolk book. Petrangelo aided the Wolk operation by providing a regular and consistent market for Wolk's lay off betting. Thomas served as an agent for or collaborator with the Wolk book in arranging bets under circumstances assumed to be favorable under the line offered by an unnamed third party bookmaker.

The case against Schullo discloses a somewhat loose arrangement between the Wolk organization and Schullo. Schullo made at least some lay off bets with the Wolk book on a fairly regular basis and apparently also received some lay off bets from Wolk. Although the nature of the relationship between Schullo and the Wolk book is not as clearly established by the transcribed conversations as in the case of Petrangelo and Thomas, these conversations do indicate that Schullo and the Wolk book frequently exchanged lay off bets. From this evidence, a jury could conclude that in providing a regular market for Wolk's lay off bets, Schullo assisted the Wolk operation in the balancing of its books on various athletic contests. As such, a jury could

conclude that Schullo conducted or financed a part of the Wolk operation.

Since the evidence establishes that more than five persons (including the appellants) were involved in the conduct and financing of the Wolk operation, the activities of each appellant in the Wolk gambling business fall within the reach of 18 U.S.C. § 1955. *See United States v. Brick*, No. 73-1162 (8th Cir., filed Aug. 15, 1974); *United States v. Ceraso*, 467 F.2d 647 (3d Cir. 1972); *United States v. Harris*, 460 F.2d 1041 (5th Cir.), *cert. denied*, 409 U.S. 877 (1972).

Finally, we turn to appellants' claim of error in the instructions. Judge Neville instructed the jury in terms of the statute, adding in explanation:

> Now, the words, "Conduct, finance, manage, suprevise, direct or own all or part of" are to be given their normal, customary meaning. *If it is proven beyond a reasonable doubt that a defendant here on trial is a bookmaker himself, and exchanges line or other information, or places or accepts layoff bets with another bookmaker,* you may consider that defendant as conducting, financing, managing, directing or owning all or part of a gambling business of the other bookmaker.
>
> On the other hand, if a person is merely a customer placing a bet with a bookmaker, he does not fit within the definition of these words.
>
> So, if a person is merely a customer placing a bet or bets with a bookmaker, without being a bookmaker himself or being an employee, agent, or runner of a bookmaker, then the defendant is not a person who conducted, financed, managed, supervised, directed, or owned all or part of an illegal gambling business. (Emphasis added).

The appellants focus on that part of the instruction that we have emphasized above. This portion of the instruction, stand-

ing by itself, appears to be somewhat broader in reach than the statute since isolated and casual lay off bets and an occasional exchange of line information may not be sufficient to establish that one bookmaker is conducting or financing the business of a second bookmaker. However, the court clearly stated that " 'conduct, finance, manage, supervise, direct or own all or a part of' are to be given their normal, customary meaning." Moreover, the court, in explaining the contentions of the parties to the jury, emphasized appellants' contention that their exchange of line information or lay off betting with the Wolk book did not constitute the "conducting, financing, managing, supervising, or directing" of all or part of an "illegal gambling business."

The evidence discloses a consistent rather than an isolated pattern of conduct between the Wolk-Capra-Fishman book and each appellant. Under such circumstances and viewing the instructions as a whole, we conclude that Judge Neville did not commit any prejudicial error in instructing the jury.

Accordingly, we affirm.

Heaney, Circuit Judge, dissenting.

I respectfully dissent. I agree with Judge Lay's dissent in *United States of America v. Eugene Schaefer, et al.*, Nos. 73-1506, 73-1526, 73-1538, 73-1577, 73-1578, 73-1611 and 73-1617 (8th Cir. December ..., 1974), with respect to the "five or more" requirement of 18 U.S.C. § 1955, and would hold that the requirement was not met here. Also, I do not believe that *Chavez* forecloses a remand for an evidentiary hearing to examine the truth of the Attorney General's affidavit.

A true copy.

Attest:

Clerk, U. S. Court of Appeals, Eighth Circuit.

APPENDIX B

United States of America,
Plaintiff,

v.

Frank Schullo et al., Defendants.

No. 4-71 Cr. 155.

United States District Court
D. Minnesota
Fourth Division

June 22, 1973

Defendants were tried before a jury and found guilty of violating the federal antigambling statute. On posttrial motions, the District Court, Neville, J., held that the statutory term "gross revenue" means the total amount of bets handled, dealt with or received as distinguished from any net figure or amount from which deductions have been taken, and that the jury properly found on the evidence that defendants were conducting and/or financing the bookmaking business of three other persons and thus comprised part of the five persons who must be involved in a gambling business to violate the statute.

Motions denied.

1. **Gaming Key 62**

Under the federal antigambling statute, which requires, inter alia, that the business in question have a gross revenue of at

least $2,000 in any single day, the term "gross revenue" means the total amount of bets handled, dealt with or received, as distinguished from any net figure or amount from which deductions are taken. 18 U.S.C.A. § 1955.

See publication Words and Phrases for other judicial constructions and definitions.

2. **Gaming Key 79(1, 2)**

Intent of Congress in the federal antigambling statute is to include all those who participate in the operation of a gambling business, regardless of how minor their roles and whether they be labeled agents, runners, independent contractors or the like, and only customers of the business are to be excluded. 18 U.S.C.A. § 1955.

3. **Gaming Key 101**

As the jury could find beyond a reasonable doubt, in prosecution for violation of the federal antigambling statute, that all three defendants took "lay-off" bets from certain "book," though defendants as separate bookmakers did not directly operate that book, and as the jury was also entitled to find that defendants furnished and exchanged "line" information up to several times on some days, the jury, premised on the theory that those exchanges were necessary to the successful operation of the book, properly found that defendants were conducting and/or financing the aforesaid "book" of three other persons and thus comprised part of the five persons who must be involved in a gambling business to violate the statute. 18 U.S.C.A. § 1955.

4. **Gaming Key 62**

Words "conduct" and "finance," within meaning of the federal antigambling statute, should receive a broad definition to accomplish the purposes of the Organized Crime Act. 18 U.S.C.A. § 1955.

5. **Telecommunications Key 496**

Failure to serve timely or at all the inventory of wiretap interceptions as required by the federal antigambling statute would not justify dismissal of an accused on whom no service was made but who had actual knowledge. 18 U.S.C.A. § 2518(8)(d).

6. Telecommunications Key 496

Fact than an indictment had been returned against former Attorney General did not impugn his testimony or affidavit, at least unless and until a conviction were to follow, and was not ground for crediting the claim of defendants, charged with violating the federal antigambling statute, that the electronic surveillance or wiretap interception which comprised the principal incriminatory evidence in their case was never properly authorized by the former Attorney General. 18 U.S.C.A. § 2516.

7. Telecommunications Key 496

Once the Attorney General himself has approved an application for electronic surveillance, further ministerial acts are unimportant; accordingly, once the former Attorney General had approved wiretap application, it was unimportant that the then assistant attorney general's ministerial act of sending a letter of approval was in fact subscribed by, and his name affixed thereto by, the then deputy attorney general. 18 U.S.C.A. § 2516.

Robert G. Renner, U. S. Atty., by Thorwald H. Anderson, Asst. U. S. Atty., for plaintiff.

Ronald I. Meshbesher, Minneapolis, Minn., for defendants Schullo and Petrangello.

Robert J. Milavetz, Minneapolis, Minn., for defendant Steve Thomas.

Neville, District Judge.

Defendants were tried before a jury and found guilty of violating 18 U.S.C. § 1955, the Federal anti-gambling statute. The court instructed the jury that, under that law, before any defendant could be found guilty the government must establish beyond a reasonable doubt:

1) that a gambling business was conducted in the State of Minnesota;

2) that the business violated the laws of the State of Minnesota.

3) that the business had a gross revenue of at least $2,000 in any single day;

4) that there were five or more persons who did "conduct, finance, manage, supervise, direct or own all or a part of a gambling business . . ."

The evidence was very clear that three co-defendants, not presently on trial i.e., William Wolk, Jack Capra and Myron Fishman, conducted a gambling business in the State of Minnesota in violation of state law. Wolk, Capra and Fishman pled guilty to another offense and at least two of them were in jail at the time of this trial. These three ran and operated a bookmaking business between at least the dates of February 21, 1971 and approximately June 22, 1971. There is no question

but what their activities violated the laws of the State of Minnesota and in final argument counsel for Schullo and Petrangello (though not counsel for Thomas) conceded that the evidence had established the first two statutory requirements and that Schullo and Petrangello had been engaged in a gambling business in violation of Minnesota State law. Though not so admitted by Thomas' counsel, the uncontroverted evidence as to him and the others was so strong as to leave no doubt of fulfillment of requirements 1 and 2 and the court so commented to the jury.

[1] Counsel for all defendants made challenges to elements 3 and 4 as to not being sustained in the evidence and affected by alleged error in the manner in which the court instructed the jury. As to element 3, a required showing of gross revenue of at least $2,000 in any single day, the government introduced transcripts of telephonic conversations with the "book" showing that on February 20th bets totaling in excess of $25,000 were placed and again on March 3rd bets in excess of $7,000 were placed. The statute provides that a gambling business must receive *gross revenue* in excess of $2,000 in any single day. Defendants' contention is that the court erred in instructing the jury in regard to total bets placed as a measure of gross revenue. It is their view, as nearly as the court has understood it, that gross revenue is an accounting concept and in effect should be analogized to the cost of goods sold in a financial statement for a normal business, *i. e.*, total revenue less the cost of purchasing and manufacturing the products sold, arriving at gross profit before any deductions for overhead, depreciation, taxes or miscellaneous expenses. The court rejected this and instructed the jury that gross revenue as used in the statute means all wagers or bets accepted, *i. e.*, the total of all bets and wagers placed including credit as well as cash transactions. Counsel contend that in operating a "book" some bets are won and collected but that some bets are lost and must be paid off. Therefore, according to defendants the proper way to determine gross revenue is

to deduct the payoffs from the total receipts thereby arriving at the bookmaker's net figure. The court is unequivocally convinced that if Congress had intended that definition it would have phrased the statute in different terms. Gross revenue must mean total amount of bets handled dealt with or received as distinguished from any net figure or amount from which deductions have been taken. This court patterned its instruction after the definition in United States v. Ceraso, 467 F.2d 653 at page 657 (3d Cir. 1972) where the appellate court stated:

> "The legislative history indicates that Congress contemplated that the $2000 figure would refer simply to the amount wagered in any one day. Throughout the discussion of the legislation, many Congressmen relied heavily on the Report of the President's Commission on Law Enforcement and Administration of Justice, The Challenge of Crime in a Free Society. The report used the term 'gross revenue' to indicate the amount that it believed was wagered during any one period in the United States. It carefully distinguished that figure from the profit it believed organized crime made on such activity. *Id.*, at 189. During the debate, Congressmen picked up this terminology, and used the term 'gross revenue' to mean the total amount bet. Most significantly, Senator Hruska, who added the provision relating to syndicated gambling to the Organized Crime Statute, stated:
>
> > The suggested standard for determining that such an operation is of sufficient size to warrant Federal intervention is entirely reasonable and practicable. *Any bookmaking or numbers operation which does* more than $2000 in business in one day . . . must have a substantial adverse effect on the flow of moneys and goods in interstate commerce. (Emphasis in original) 115 Cong. Rec. 10736 (1969).
>
> The concern of Congress was the amount of daily business transacted by gamblers, not the sum of their profits.

> It is a severe task for the Government to obtain sufficient evidence to sustain any convictions under any definition of gross revenue. It would complicate their task enormously if they had to attempt to show the net profits from such an operation in any one day. Gambling records are obviously not public documents. The amount of profits could generally be proven only by seizure of carefully secreted files. The interpretation suggested by appellants would render the enforcement of this statute a mockery. We, therefore, conclude that there was sufficient evidence to sustain the conviction and that the verdict was not against the weight of the evidence."

This court adopted the rationale and language of *Ceraso* and believes there was no error here.

[2] In regard to the question of the fourth requirement *i. e.*, "conduct, finance, manage, supervise, direct or own all or a part of a gambling business" the court instructed the jury as follows:

> "The words 'conduct, finance, manage, supervise, direct or own all or part of' are to be given their normal, customary meaning. If it is proven beyond a reasonable doubt that a defendant here on trial is a bookmaker himself and exchanges line or other information or places or accepts layoff bets with another bookmaker, you may consider that defendant is conducting, financing, managing, directing or owning all or part of the gambling business of the other bookmaker.
>
> On the other hand, if a person is merely a customer placing a bet with a bookmaker he does not fit within the definition of those words.
>
> So if a person is merely a customer placing a bet or bets with a bookmaker, without being a bookmaker him-

> self, or without being an employee or agent or runner of a bookmaker, then the defendant is not a person who conducted, financed, managed, supervised, directed or owned all or part of an illegal gambling business."

The court obtained this definition from the *Ceraso* case above cited, and from a synthesis of the language found in United States v. Becker, 461 F.2d 230, 232 (2d Cir. 1972), and United States v. Harris, 460 F.2d 1041, 1049 (5th Cir. 1972). These cases trace the legislative history of the 1970 Organized Crime Control Act. *Becker* portrays Section 1955 as having been enacted *in pari materia* with Section 18 U.S.C. § 1511 which uses the same language and has explicit legislative history to support the conclusions of this court. Thus Congress' intent was to include all those who participate in the operation of a gambling business, regardless of how minor their roles, and whether they be labeled agents, runners, independent contractors or the like. Only customers of the business were to be excluded. Perhaps this court's instruction did not go even that far for no reference therein was made to the term "operation".

The court recognizes that the controversy here centers mostly around the word "conduct", and perhaps the word "finance", as there was no claim by the government that the three movant-defendants now before the court were owners or that they directly managed, supervised or directed the Wold-Capra-Fishman "book."

From the evidence before the jury however reasonable minds could find beyond a reasonable doubt that the operation of a successful "bookmaking" business requires an opportunity to "lay off" bets, *i. e.*, to obtain sort of a re-insurance. If too many people bet only one side of an athletic contest a bookmaker assumes too great a risk of loss and endeavors to find another bookmaker where he can "lay off" his excess so as to keep his bets on each side of a game or event as equal in

amount as possible. Lay off betting then is a necessity for successful bookmaking operation.

The jury further could find under the evidence that it is necessary or at least very desirable that a bookmaker be continuously informed on other bookmakers' "lines" *i. e.*, apprised of "line" information comprising point spreads and odds being used by other bookmakers. Such is necessary to prevent undue betting on another book because the odds are better. In addition, clever betters and gamblers will attempt to "middle" two bookmakers if possible. That is, they will bet both sides of the same game with different bookmakers who are using different "line" information in hopes of winning against both bookmakers if the final score is in the middle.

[3] There is no question but what the jury could find beyond a reasonable doubt that all three defendants took lay-off bets from the Wolk-Capra-Fishman "book", although they, as separate bookmakers, did not directly operate that book. The jury could find that these movant-defendants did furnish and exchange "line" information up to several times on some days. Premised on the theory that these exchanges are necessary to the successful operation of book, the jury could and apparently did find that these three men were conducting and/or financing the Wolk-Capra-Fishman bookmaking business and thus comprised part of the five persons who must be involved in a gambling business to violate the statute.

[4] The court recognizes that the Congressional language used is perhaps inept to some extent but the court's function is to attempt to instruct the jury so as to permit it to act upon the Congressional intent and the Congressional history set out in the three cases above. Although the Eighth Circuit has not passed upon the matter, this court reaches the conclusion from the above three circuit court cases and from studying the statute that the words "conduct" and "finance" should receive a

broad definition to accomplish the purpose of the Organized Crime Act. This court is satisfied with the construction used by the three circuits in the above cases. *See* United States v. Harris, *supra*, in support of the definition that the word "conduct" means that "this section applies generally to persons who participate in the . . . conducting of an illegal gambling business." Defense counsel's argument that the strict dictionary definition of the words "conduct" and "finance" should be adopted is not well taken. Attention of the court is called to an excerpt from 13 Criminal Law Reporter 3015, quoting a proposed amendment to 18 U.S.C. § 1955, said to be recommended by the present Executive. This would insert that one is guilty of violating § 1955 if he "Receives lay off wagers or otherwise provides re-insurance in relation to persons engaged in gambling." From this springs the familiar argument that such is not presently the law; else why would such an amendment be proposed. The court rejects this. At least two of the three circuit court cases above cited have in effect included the above as encompassed in the term "conduct" or "finance" and while the proposed amendment would of course make the issue more clear, it does not follow that such is required nor that the law is to the contrary unless amended.

[5] Counsel for Steve Thomas, though joined in by other counsel, particularly challenges the order of Chief Judge Devitt of this Court, made before the defendants had been arrested and prior to the time the indictment was returned, which extended the time permitted to serve the inventory required by 18 U.S.C. § 2518(8)(d). That challenge is based on the fact that extension orders were signed on May 6, 1971 extending the inventory service period to June 15, 1971 and again on June 8, 1971 extending the period to June 30, 1971, neither of which were formally filed, however, with the clerk of court until October 6, 1971. Counsel apparently would like to cross-examine the Chief Judge or in some way attempt to establish that the orders were signed *nunc pro tunc*. No offer of proof

was made; apparently counsel *just hope to discover some irregularity*. In view of the decision of the Court of Appeals in this very case, United States v. Wolk, 466 F.2d 1143 (8th Cir. 1972), which held that failure to serve any inventory timely or at all did not justify dismissal of the defendants on whom no service was made but who had actual knowledge, it would seem that this allegation by defendants' counsel is without merit even if true. Further this court passed upon this identical matter in its order ruling on pretrial motions dated November 2, 1971 (unpublished).

Another attack on the entire trial proceedings again is raised by defense counsel. They reassert their claim that the electronic surveillance or wiretap interception which comprised the principal incriminatory evidence in the case, never was properly authorized by the Attorney General or the Attorney General's office in Washington, D.C. and thus all telephone conversations should have been suppressed. Counsel have requested an evidentiary hearing on this matter, stating that they would intend to subpoena the former Attorney General John N Mitchell, former Assistant Attorney General Will Wilson, and former Deputy Assistant Attorney General Henry E. Peterson or some or all of them. This court ruled on this matter once and denied a motion to suppress the wiretap evidence in an order dated August 18, 1972. On an appeal in this very case, United States v. Wolk, 466 F.2d 1143 (8th Cir. 1972), particularly at fn. 2 the Court of Appeals could be argued to have passed on this question. Long prior to trial defense counsel had requested an evidentiary hearing to inquire into the procedures which took place at the Attorney General's office under 18 U.S.C. § 2516 which requires:

> "The Attorney General, or any Assistant Attorney General specifically designated by the Attorney General, may authorize an application to a Federal judge . . . for . . . an order authorizing or approving the interception of wire or oral communications . . ."

On the eve of the opening of the trial in the above matter defense counsel renewed the motion, which this court again denied by order dated April 26, 1973. The court at that time was cited to United States v. Giordano, 469 F.2d 522 (4th Cir. 1972), a case however where it was admitted that neither the Attorney General or Will Wilson the Assistant Attorney General had ever heard of the application for wiretap or signed any letters or documents authorizing the same. Counsel now are renewing their request, after having been found guilty by the jury, that they be allowed the evidentiary hearing. In another gambling case originating in this court United States v. Kleve et al., (J. Larson, 4—71 Cr. 154, D.Minn. May, 1973), the Court of Appeals for the Eighth Circuit had before it a very similar if not the exact same question. By its order of June 12, 1973, that court denied a motion to remand the case to the District Court for the purpose of taking oral evidence in an effort to impugn the affidavits submitted from the Attorney General's Office by the United States Attorney. It is noted that Judge Mehrtens in a very recent case in Florida, United States v. Davis, (72—241—Cr.—JE June 4, 1973) granted a suppression motion for failure of the Attorney General's office to follow the requirements of the wiretap statute, but under factually differing circumstances than here.

[6] At the original pretrial motion culminating in this court's order of August 18, 1972, the court was presented with an affidavit from John N. Mitchell which is set out in *haec verbae*:

> "John N. Mitchell, being duly sworn, deposes and says:
> I held the office of Attorney General of the United States from January 21, 1969, through March 1, 1972.
>
> On February 16, 1971, I approved a request for authority to apply for an interception order in this matter and personally initialed a memorandum of that date reflecting my favorable action on the request. I have examined the original of this memorandum and certify that it bears my

initials which were personally affixed by me on February 16, 1971. Attached is a copy of my personally initialed memorandum of that date reflecting my favorable action on the request.

My memorandum of approval in this case constituted a notification to the Assistant Attorney General of the Criminal Division that the discretionary action of approving the request to make application to the court for an interception order had been taken by me."

The memorandum referred to bears the initials JNM and is copied below:

United States Government
Memorandum

Department of Justice

Date: Feb. 16, 1971
JNM:TM:lrt

To : Will Wilson
Assistant Attorney General
Criminal Division

From : John N. Mitchell
Attorney General

Subject: Interception Order Authorization

This is with regard to your recommendation that authorization be given to Robert G. Renner, United States Attorney for the State and District of Minnesota to make application for an Order of the Court under Title 18, United States Code, Section 2518 permitting the interception of wire communications for

a fifteen (15) day period to and from telephone numbers 612-339-6896, 612-339-6897, and 612-339-6898, located at Room 601 Northwest Federal Building, 730 Hennepin Avenue, Minneapolis, Minnesota, in connection with the investigation into possible violations of Title 18, United States Code, Sections 1084, 1952, 1955, and 371, by William Charles Wolk, Louis Ritacco, David Bohn, Myron Robert Fishman, James A. Mancino, Joseph L. Wolk, Jack Ernest Capra, and others as yet unknown.

Pursuant to the power conferred on me by Section 2516 of Title 18, United States Code, you are hereby specially designated to exercise that power for the purpose of authorizing Robert G. Renner, United States Attorney, to make the above-described application.

Counsel are aware of current "Watergate" developments in Washington and the fact that the former Attorney General has been indicted, apparently in connection with or as the result of certain campaign contribution matters. The mere fact that an indictment has been returned as reported in the public press is not of course evidence of any guilt and is not anything on which this court would feel free to act as impugning the testimony or affidavit of John N. Mitchell, at least unless and until a conviction were to follow. The indictment alone does not show an independent cause or source for impeachment of the affidavit which John N. Mitchell has furnished. Counsel has made no showing of any possible way of impugning the above affidavit, though claiming it to be hearsay. They are unable to make any showing that the affidavit is in any way false or that there is anyone who could so establish. They apparently hope to wring an admission from the witness or witnesses on the stand which would aid their cause, but have shown the court nothing which would augur for such.

[7] It is crystal clear that if the affidavit is truthful it constitutes compliance with 18 U.S.C. § 2516. The only possible

irregularity that the court can discover in the procedure is that the actual letter to the local United States Attorney Robert G. Renner, ostensibly signed by Will Wilson, then Assistant Attorney General, was in fact subscribed by, and his name affixed thereto, by one Henry E. Petersen who was then Deputy Attorney General. United States v. Cox, 462 F.2d 1293 (8th Cir. 1972), is quite clear that this is not a cognizable defect. It is definite under *Cox* that once the Attorney General himself has approved an application for electronic surveillance, further ministerial acts are unimportant. The court there stated, acting on affidavits as in the case at bar:

> "Because Mr. Mitchell did approve the application, it is unimportant that Mr. Wilson's ministerial act of sending a letter of approval to Mr. Hamilton was actually signed by Mr. Peterson, and it is irrelevant that the application and order recited the authorizing officer as Mr. Wilson rather than Mr. Mitchell. *Accord*, United States v. Pisacano, 459 F.2d at 259, n. 5. ***But see*** United States v. Focarile, 340 F.Supp. 1033 (D.Md. 1972). The requirement in 18 U.S.C. § 2518 that the authorizing officer be named was designed to insure that decisions to wiretap were made by the named officials and did not reach into the lower echelons of command. That requirement should not be construed so inflexibly as to invalidate a wiretap application personally authorized by the Attorney General of the United States simply because the request recites the Assistant Attorney General as the applying officer." 462 F.2d at 1300.

In view of this case this court could not hold the proceedings to be abortive on account of the claimed signature defect, and a further evidentiary hearing thereon would be of no value and could reveal nothing in this regard. The request of the defendants for an evidentiary hearing is thus denied.

Other assignments of error are without merit. The question of the constitutionality of Section 1955 has been determined

by the Eighth Circuit. *See* United States v. Cox, 462 F.2d 1293 (8th Cir. 1972), particularly cases collected in fn. 12. The wiretap procedure has been held constitutionally sufficient as to existence of probable cause. See, United States v. Kleve, 465 F.2d 187 (8th Cir. 1972). In the court's view, defendants' requested instructions which were refused were not apposite. The court perceives no prejudicial result from admission of challenged evidence nor to incidents which occurred during final argument.

A separate order denying defendants' motions has been entered.

APPENDIX C

United States Court of Appeals
For the Eighth Circuit

United States of America, Appellee, v. Eugene Schaefer, et al., Appellant.	Appeals from the United States District Court for the Eastern District of Missouri. Nos. 73-1506 73-1577 73-1578 73-1611 73-1617

Submitted: June 25, 1974

Filed: January 3, 1975

Before Lay, Bright and Stephenson, Circuit Judges

Lay, Circuit Judge, dissenting.

I would reverse the convictions on both counts. Congress did not intend by the enactment of § 1955 to expand federal criminal law so as to rival the power of the states to regulate localized gambling operations.[1] Yet this is the interpretation of

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[1] SENATOR McCLELLAN. I support the very laudable objectives of S. 2022, the illegal gambling business bill. Nevertheless, there are some reservations that I must express. I am concerned that the effect of this bill would be to extend Federal jurisdiction so far that it would be virtually the same as local criminal jurisdiction in this area. Now you have mentioned this problem in your remarks already.

MR. WILSON. We have tried to head that off, and if we haven't done it, it needs to be done, *because it is not our purpose to move all this into Federal courts.* (Emphasis added.)

Hearings before the Subcommittee on Criminal Laws and Procedures of the Senate Committee on the Judiciary, 91st Cong., 1st Sess. 396 (1969).

§ 1955 which is now adopted by the majority opinion. It is inconceivable to me that Congress intended to commit the limited law enforcement resources of the federal government and the federal courts to the regulation of localized bookmaking. The Organized Crime Control Act of 1970, of which § 1955 is a part, was aimed at countering "organized crime" and its syndicated activities which are carried out on so large a scale as to affect interstate commerce and hence become a national concern. The several gambling provisions of the Act were intended to further its purpose by permitting federal prosecution of those gambling enterprises whose profits flowed to syndicated crime. *United States v. Sacco*, 491 F.2d 995, 998-99 (9th Cir., 1974) (en banc). The House Judiciary Committee Report states:

> The intent of section 1511 and section 1955, below, is not to bring all illegal gambling activity within the control of the Federal Government, but to deal only with illegal gambling activities of major proportions. It is anticipated that cases in which their standards can be met will ordinarily involve *business-type gambling operations of considerably greater magnitude than simply meet the minimum definitions*. The provisions of this title do not apply to gambling that is sporadic or of insignificant monetary proportions. It is intended to reach only those persons who prey systematically upon our citizens and whose syndicated operations are so continuous and so substantial as to be of national concern, and those corrupt State and local officials who make it possible for them to function. (Emphasis added.)

H.R. Rep. No. 1549, 91st Cong., 2d Sess. (1970); 2 U.S. Code Cong. & Admin. News 1970 at 4029.

The majority opinion holds that several individual bookmakers, who do not share phones, customers, profits or losses, or maintain any specific accounting or bookkeeping among one

another, can nevertheless fuse themselves into a single illegal gambling business involving five or more persons as proscribed by 18 U.S.C. § 1955. The magic synthesis by which all became one was allegedly accomplished by exchanging line information and, when it was to their individual profit, making layoff bets with the same person. The inevitable result of this decision is to subject all bookmakers to federal prosecution, a result which is contrary to the language and purpose of the Act.[2]

The legislative history of § 1955 makes it clear that Congress intended to limit the reach of § 1955 to entities so large and continuous that they might rationally be presumed, at least as a class, to finance organized crime and hence to fall within

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[2] It is uncontroverted that both the exchange of line information and layoff betting are necessary to "running a book," no matter how small. At trial the government's gambling expert, FBI Special Agent T. C. Whitcomb, testified:

> I think we've got to realize that we're speaking about a bookmaking business. Bookmaking by its very nature requires cooperation. Yes. You may have individual enterprises by various bookmakers in an area or a large area or a small area, but the loose affiliation I'm speaking about again requires cooperation between them in exchanging the line information, in taking of friendly bets, for paying for services, furnishing line information, for example, and also to have available certain of these bookmakers which will accept wagering in the terms that we're talking about, lay off, which protects the interests of the individual bookmakers and where one bookmaker lays off this time to another bookmaker, he will reciprocate at a later time and will take lay off from the other individual or may do it all on the same day. This is the nature of the bookmaking business. It can't be escaped.

Appendix at 401.

> Q. (By Mr. Cashill) Sir, in your opinion, what function does frequent or substantially continuous conversation among bookmakers for the purpose of exchanging lay off bets or wagers or to exchange line information serve insofar as their bookmaking operation is concerned?
>
> A. It keeps each of the individual bookmakers so involved in these conversations aware of changes, the very important changes, for example, in line or point information that comes

federal jurisdiction under the commerce power.[3] To that end, the statute requires proof of the existence of a single "illegal gambling business" involving five or more persons other than customers who "conduct, finance, manage, supervise, or own" the business for at least thirty consecutive days. 18 U.S.C. § 1955(b)(1). In light of this purpose, I cannot conclude that this language, which in common understanding and ordinary commercial usage would refer to a unified, organized business enterprise, was intended by Congress to encompass the isolated activities of these defendants.

The statutory language requiring proof that five or more persons conducted a *single* business commands evidence that each defendant acted *in furtherance of the alleged joint business.* At oral argument, the government conceded that mere exchange of line information did not evidence involvement in a single bookmaking business. However, the additional proof that defendants exchanged layoff bets with Lancaster with the object of in-

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> across in sporting events. It also permits them to know how the other bookmakers are being bet in case that, as bookmakers have to do from time to time, is adjust their line based on the original line that he had in order to probably attract activity or action or wagers on the other side of an event or more events. Generally, it is this mutual cooperation again that I speak about, the nature of bookmaking, independently organized, but must cooperate above the bettor level in order to continue to function adequately.

Appendix at 392-93.

If that necessary cooperation in itself proves that the participants are conducting the *same* illegal gambling business, then the requisite five persons can always be found and the statutory limitation is rendered meaningless.

[3] The justification for federal jurisdiction is premised on the rational connection between large-scale gambling and the flow of commerce. *United States v. Sacco,* 491 F.2d 995 (9th Cir. 1974). Thus, the constitutionality of the Act rests in large measure on its limited application to illegal operations of national concern. For the federal government now to expand the Act's prohibitions to local activities is to betray the congressional purpose.

dividual profit should be similarly insufficient under the Act.[4] More is needed to show that they were involved in the *same* business.

The majority reasons that Congress could not have intended to require further proof of complicity because bookmakers do not as a rule operate with centralized cashiers, bookkeeping and control, and that Congress was aware of that fact. Yet almost all § 1955 convictions affirmed by the circuit courts have rested on just such a further showing in bookmaking as well as other gambling businesses. Where employees are paid a salary or commission, where co-workers are subject to orders such as use of a uniform line, where several persons use the same office or phones to receive bets, where there is division of functions such as bookkeeping, taking bets and paying off winners, or where there is central handling of revenues, the language of the Act can rightly be invoked. *See United States v. Sacco*, 491 F.2d 995, 998 (9th Cir. 1974) (en banc) (division of functions among owners, phonemen and splitters); *United States v. Meese*, 479 F.2d 41, 42 (8th Cir. 1973) (partnership with 6-8 salaried employees and division of functions); *United States v. Hunter*, 478 F.2d 1019, 1022 (7th Cir. 1973) (partners employed 12

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[4] This is not to suggest that persons who place and accept layoff bets are immune from prosecution under § 1955 as mere customers. Congress intended layoff bettors in some instances to be within the reach of the statute. *Cf. United States v. DeCesaro*, 502 F.2d 604, 611 (7th Cir. 1974); *United States v. McHale*, 495 F.2d 15, 18 (7th Cir. 1974). However, in my view something more than mere acceptance of those bets is needed to show that both are involved in the *same* business. That something extra could be demonstrated, as in *United States v. Ciamacco*, 362 F. Supp. 107 (W.D. Pa.), *aff'd mem.*, 491 F.2d 751 (3d Cir. 1973), by the existence of an *agreement* to rebate a percentage of the profits to layoff bettors. In addition, it might be sufficient if the government could show, over a period of several weeks, that the "layoff man" never refused to accept proffered bets or at least that he attempted to help the others place theirs if he did not want to accept them himself. That was not the case here, for these defendants refused to take layoffs, even from Lancaster, their supposed "boss," when it was not necessary to balance their *own* books on an individual basis.

others at same office); *United States v. Fino*, 478 F.2d 35, 36 (2d Cir. 1973) (several bet-writers phone bets in to central office with central bookkeeping); *United States v. Becker*, 461 F. 2d 230, 232 (2d Cir. 1972) (owners employed four runners); *accord, United States v. Harris*, 460 F.2d 1041, 1043 (5th Cir. 1972); *United States v. Vigi*, 363 F. Supp. 314, 321 (E.D. Mich. 1973); *United States v. Kohne*, 358 F. Supp. 1053, 1064 (W.D. Pa. 1973); *United States v. Mainello*, 345 F. Supp. 863, 883 (E.D.N.Y. 1972).

In *United States v. Bobo*, 477 F.2d 974 (4th Cir. 1973), the evidence showed considerably more interaction and evidence of agreement between the defendants than mere exchange of line and layoffs. The Fourth Circuit noted that the bookmakers had developed a system of placing split bets or "middling" utilizing the differences in the line in various states. Under the system the defendants might not always win, but they could not lose. *Id.* at 977. Furthermore, they always used a uniform line[5] to "prevent outsiders from playing them against each other, which was what they were frequently doing to other bookmakers." *Id.* at 990. Finally, some of the defendants relayed bets from the others to outside bookmakers as part of their system. *Id.* at 977.

Similarly, in *United States v. Ciamacco*, 362 F. Supp. 107 (W.D. Pa.), *aff'd mem.*, 491 F.2d 751 (3d Cir. 1973), the central figure, Levine, had an *agreement* with the individual bookmakers who laid bets off to him whereby he would rebate a percentage of his profits from handling their accounts. Clearly this demonstrates an essential interaction missing here.

The analogy drawn to describe the *Kotteakos* conspiracies is equally appropriate in this case. The appellants' separate

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[5] The evidence showed that defendants in this case did not always use the same line. Yet the government's own expert witness testified that within a single bookmaking business, a uniform line was essential.

bookmaking enterprises formed a pattern of " 'separate spokes meeting at a common center,' though . . . without the rim of the wheel to enclose the spokes." *Kotteakos v. United States*, 328 U.S. 750, 755 (1946). Lancaster was the hub, the common denominator, of otherwise unrelated enterprises. Even his position was, as likely as not, fortuitous. Had another's phone been tapped, that person might have appeared as the hub, and quite a different group of defendants might have been indicted for the expert admitted that each of those who talked to Lancaster probably sought the opinions of and laid off bets to other bookmakers with equal frequency. That necessary cooperation and loose affiliation are the nature of the bookmaking business, but a higher degree of concerted activity was required by Congress in § 1955. Drawing again on *Kotteakos*, it is appropriate to remember that

> [t]hieves who dispose of their loot to a single receiver—a single "fence"—do not by that fact alone become confederates: they may, but it takes more than knowledge that he is a "fence" to make them such.

Id. at 755.

Similarly, the fact that all of the appellants used Lancaster to supply some of the necessary information and to take layoffs for their individual businesses does not make them all partners in a single gambling business under § 1955. That too takes more.

The majority concedes that proof of the substantive offense under § 1955 requires the same elements as does conspiracy and then reverses the conspiracy convictions as violative of double jeopardy. While I concur in the application of the constitutional principle governing double jeopardy, I conclude that there is insufficient proof either of conspiracy or the substantive offense. In each instance, the prosecution has failed to show that com-

monality of purpose which would link the defendants into a single gambling business.[6]

In *Blumenthal v. United States*, 332 U.S. 539 (1947), the Court found one overall conspiracy and then commented on *Kotteakos*:

> The case therefore is very different from the facts admitted to exist in the *Kotteakos* case. Apart from the much larger number of agreements there involved, no two of those agreements were tied together as stages in the formation of a larger all-inclusive combination, all directed to achieving a single unlawful end or result. On the contrary each separate agreement had its own distinct, illegal end. Each loan was an end in itself, separate from all others, although all were alike in having similar illegal objects. Except for Brown, the common figure, no conspirator was interested in whether any loan except his own went through. And none aided in any way, by agreement or otherwise, in procuring another's loan. The conspiracies therefore were

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[6] The Third Circuit recently reversed convictions for the related offense of conspiracy to facilitate an illegal gambling business under 18 U.S.C. § 1511 (also enacted as part of the Organized Crime Control Act of 1970) for lack of evidence that five or more persons were involved. *United States v. Riehl*, 460 F.2d 454 (3d Cir. 1972). The court found that while one defendant was indeed selling "punchboards" for gambling purposes in violation of state law, and two others were arguably engaged in helping him do that, nevertheless there was no showing that *five* persons were involved. The defendant's employees did not handle the punchboards. The others were found to be merely customers, who bought the punchboards and used them for gambling purposes. Their independent character was not lost merely because they purchased the essential supplies for their type of gambling business from a common supplier. Since they did not kick back any of the profits to the punchboard supplier, the court found that they were not involved in his business for purposes of the statute, but rather "operated for their own account." *Id.* at 460. The analogy to bookmakers who cooperate only by sharing line information and exchanging layoff bets should be clear; while they do receive essential supplies from one another, that is not enough to create the danger of true large-scale organized crime the statute was intended to reach.

> distinct and disconnected, not parts of a larger general scheme both in the phase of agreement with Brown and also in the absence of any aid given to others as well as in specific object and result. There was no drawing of all together in a single overall comprehensive plan.

332 U.S. at 558.

Here the government failed to prove one overall general scheme among the parties to conduct a gambling business of five or more persons. There is no proof of any agreement among the defendants generally, but rather a bare showing that several of the defendants each exchanged layoff bets with Lancaster when to do so individually benefited both parties. When it did not benefit one party, proffered layoffs were freely refused, even though in at least one instance that meant that Lancaster sustained a large loss. As in *Kotteakos*, the defendants in laying off bets with Lancaster may have had similar illegal objectives, but no defendant was interested in whether the others made a profit or not. The government has failed to show that the individual defendants made Lancaster's business "their own venture."[7] *See United States v. Falcone*, 109 F.2d 579, 581 (2d Cir.) (Hand, J.), *aff'd*, 311 U.S. 205 (1940).

In *United States v. Aviles*, 274 F.2d 179 (2d Cir. 1960), the court commented on the interaction necessary to fuse several independent conspiracies into a larger single combination:

> A single act may be the foundation for drawing the actor within the ambit of a conspiracy. . . . But, since conviction of conspiracy requires an intent to participate in the unlawful enterprise, the single act must be such that

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[7] As I view the evidence, only Lancaster's "business" involved more than one person. Lonsberry and Athanas (the co-defendant who died before sentencing) sometimes relayed customer bets to Lancaster and collected losses from Lancaster's customers on his behalf. This would involve three persons in his business, but not the requisite *five* or more.

> one may reasonably infer from it such an intent. Thus, when two men join together to commit a single robbery, one may infer from their common participation in the robbery that they have conspired to commit the robbery. However, in a multiparty conspiracy of the sort revealed in the present case, with actors performing many different tasks in many places, the inference does not necessarily follow from one contact with one member of the conspiracy.

274 F.2d at 189-90.

In commenting on *Aviles*, the Seventh Circuit stated:

> [A] single act performed with parties who are involved in more than one conspiracy may be insufficient to draw an inference of the existence of an agreement between the parties in the case of multiple conspiracies. Knowledge of the existence of the other parties to the conspiracies is insufficient. While the crime of conspiracy is completed as soon as the unlawful agreement is formed, United States v. Kissel, 218 U.S. 601, 607, 31 S.Ct. 124, 54 L.Ed. 1168 (1910), it must be shown that this agreement was made prior to or during the consummation of the single act.

United States v. Varelli, 407 F.2d 735, 743 (7th Cir. 1969).

The primary thesis of the government's case is that there exists an essential network of action between the independent conduct of the defendants with Lancaster to create a common business and thus place their conduct within the scope of § 1955. The majority observes that "layoff betting is the major link connecting independent operations into an effective gambling organization that will work profitably and well for all concerned." As earlier discussed this reasoning places every local bookmaker within a federal conspiracy whether he knows it or not. This clearly was not the intent of Congress. In commercial enterprises, wholesale businesses depend on retail es-

tablishments to purchase and distribute the goods sold to them by the manufacturers who have made them each financially dependent on the other—yet, no law suggests that this interrelationship establishes a commonality of a single business. *Cf. United States v. Falcone*, 311 U.S. 205 (1940).

Simply because we deal with criminal legislation we should not twist common terminology from accepted understanding to accommodate the jurisdictional limits of federal prosecution.

A true copy.

Attest

Robert C. Tucker
Clerk
U.S. Court of Appeals
Eighth Circuit

BRIEF FOR THE RESPONDENTS IN OPPOSITION

INDEX

	Page
Opinion below	1
Jurisdiction	2
Questions presented	2
Statement	2
Argument	4
Conclusion	11

CITATIONS

Cases:

Iannelli v. *United States*, No. 73-64, decided March 25, 1975	10
United States v. *Bohn*, 508 F.2d 1145, pending on petition for a writ of certiorari, No. 74-951	7, 10, 11
United States v. *Bowdach*, 474 F.2d 812	7
United States v. *Brick*, 502 F.2d 219	6, 10
United States v. *Ceraso*, 467 F.2d 653	10
United States v. *Chavez*, 416 U.S. 562	5, 6
United States v. *DeCesaro*, 502 F.2d 604	10
United States v. *Doolittle*, 507 F.2d 1368	7
United States v. *McHale*, 495 F.2d 15	10
United States v. *Quintana*, 508 F.2d 867	7
United States v. *Ramsey*, 503 F.2d 524	7
United States v. *Riehl*, 460 F.2d 454	11
United States v. *Robinson*, 468 F.2d 189, rehearing *en banc*, 472 F.2d 973	7
United States v. *Sacco*, 491 F.2d 995	10, 11
United States v. *Schaefer*, C.A. 8, No. 73-1506, decided January 3, 1975	10

Cases—Continued Page

Statutes:

18 U.S.C. 371 2
18 U.S.C. 1084 2
18 U.S.C. 1955 ..... 2, 3, 7, 8, 10
18 U.S.C. 1955(b)(1)(ii) 7
18 U.S.C. 2516(1) 2, 4, 5, 6

In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-953

FRANK SCHULLO AND ANTHONY PETRANGELO,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A12) is reported at 508 F. 2d 1200. The opinion of the district court (Pet. App. A13-A28) is reported at 363 F. Supp. 246.

JURISDICTION

The judgment of the court of appeals was entered on January 3, 1975. The petition for a writ of

certiorari was filed on February 1, 1975. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether an evidentiary hearing was required to determine if the government's applications for court ordered electronic surveillance were properly authorized in accordance with the provisions of 18 U.S.C. 2516(1).

2. Whether the evidence established commission of an offense cognizable under 18 U.S.C. 1955.

STATEMENT

Petitioners were named in two counts of a multi-count indictment returned in the United States District Court for the District of Minnesota, charging them and fifteen others with various gambling-related offenses. Petitioners were charged with engaging in an illegal gambling business, in violation of 18 U.S.C. 1955 (count 2) and with conspiring to commit that offense, in violation of 18 U.S.C. 371 (count 1). Following numerous pre-trial motions and hearings, the trial of petitioners and four co-defendants commenced before a jury on April 30, 1973.[1]

[1] Petitioners proceeded to trial together with co-defendants Harry Finkelstein, John C. Thomas, Steve Thomas and Gerald Scherer, who were also named in counts 1 and 2 of the indictment. In addition, John Thomas was charged in a separate count (count 9) with using a telephone to transmit gambling information, in violation of 18 U.S.C. 1084. The charges against Scherer were dismissed on the second day of trial

Petitioners were convicted on the second count, charging a violation of 18 U.S.C. 1955.

Following the district court's denial of petitioners' motions for judgment of acquittal or a new trial (Pet. App. A13-A28), they were each sentenced to six months' imprisonment, to be followed by a 30-month period of probation (Pet. 8).[2] The court of appeals affirmed over the dissent of one judge.

The evidence at trial consisted primarily of petitioners' conversations with other persons, intercepted pursuant to court-authorized electronic surveillance. The intercepted conversations, together with physical evidence of gambling paraphernalia found in petitioners' possession, showed that petitioners had frequent dealings with a bookmaking business in Minneapolis, Minnesota, conducted by William Wolk, Jack Capra, and Myron Fishman, who were named in the indictment but did not stand trial in the instant case (Pet. App. A2-A3; May 15, 1973 Tr. 175-176). Petitioner Petrangelo furnished the Wolk business with his "line"—that is, the point spread on various sporting events—and received Wolk's "lay

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(Pet. 5). At the close of the government's case, the court directed judgments of acquittal as to co-defendant Finkelstein on all counts, as to co-defendant John Thomas on count 9, and as to all defendants on the conspiracy count (count 1) (May 15, 1973 Tr. 2-3). Co-defendant John Thomas was acquitted on the remaining substantive offense of conducting an illegal gambling business; petitioners and Steve Thomas were convicted (Pet. 8).

[2] Each petitioner was also fined $5,000.

off" betting on a regular and consistent basis.[3] Petitioner Schullo frequently called the Wolk operation and placed both "lay off" and personal bets with Wolk on a regular basis. Wolk also made frequent "lay off" bets with petitioner Schullo (Pet. App. A6).

ARGUMENT

1. Petitioners filed pre-trial motions to suppress evidence derived through court-authorized electronic surveillance, arguing, *inter alia*, that the application for the wire interceptions had not been properly authorized by the Attorney General or a specially designated Assistant Attorney General, as required by 18 U.S.C. 2516(1).[4] They requested an evi-

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[3] "Lay off" betting was described by the court below as follows (Pet. App. A3, n. 2):

> To protect against losses, a bookmaker normally engages in "lay off" betting whereby he passes on to another bookmaker the amount of bets by which his own "book" is unbalanced; thus to the extent he loses to his own customers, he wins back from the other bookmaker, or vice versa. The "lay off" bet is therefore, in effect, a bookmaker's insurance or reinsurance.

[4] 18 U.S.C. 2516(1) provides in pertinent part:

> The Attorney General, or any Assistant Attorney General specially designated by the Attorney General, may authorize an application to a Federal judge of competent jurisdiction for, and such judge may grant in conformity with section 2518 of this chapter an order authorizing or approving the interception of wire or oral communications by the Federal Bureau of Investigation, or a Federal agency having responsibility for the

dentiary hearing on this issue, stating that they intended to subpoena former Attorney General John N. Mitchell and former Assistant Attorneys General Will Wilson and Henry E. Petersen to determine whether the surveillance had been properly authorized (Pet. App. A23). In response, the government submitted the personal affidavit of the former Attorney General, in which he stated that he had personally approved the application in question and referred to an attached memorandum, which he had initialed, reflecting such approval (Pet. App. A24-A26). The district court denied the motion to suppress and denied a request for an evidentiary hearing on the matter. A similar assertion was made in petitioners' motions for a new trial and was again denied (Pet. App. A27).

Petitioners concede that the authorization procedure purportedly followed in this case was identical to the procedure found by this Court in *United States* v. *Chavez*, 416 U.S. 562, not to warrant suppression. They claim, however, that they should have been afforded an evidentiary hearing, in which they presumably hoped to elicit testimony from the former Attorney General that—contrary to the statement in his affidavit—he had not personally approved the electronic surveillance application. Moreover, they contend (Pet. 9) that the issue presented here is whether this Court's opinion in *Chavez* precludes an

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investigation of the offense as to which the application is made * * *.

evidentiary hearing in all cases, a question that they answer in the negative.

We submit that, properly viewed, the issue is not whether *Chavez* precludes a hearing but whether, in the circumstances of a particular case, a hearing is necessary or helpful. Here, there was no cause for such an evidentiary hearing. The former Attorney General's affidavit clearly stated that he personally had authorized the application for the electronic surveillance, and, as the district court noted (Pet. App. A26), petitioners "made no showing of any possible way of impugning the * * * [Mitchell] affidavit * * *. They are unable to make any showing that the affidavit is in any way false or that there is anyone who could so establish."

Indeed, aside from attacking Mr. Mitchell's credibility on the basis of his recent conviction, petitioners can only point to dates on various documents that indicate that the chain of events from Mitchell's authorization to the issuance of the court order all occurred on the same day. Such a suggestion does not impeach the statements in the affidavit in light of the manner in which such documents are routinely transmitted by telecommunications between Washington, D.C., and the attorneys in the field. See *United States* v. *Brick*, 502 F. 2d 219, 222, n. 7 (C.A. 8). The affidavit and accompanying documents "clearly established" that the application for electronic surveillance was authorized in compliance with 18 U.S.C. 2516(1), and the district court thus properly denied petitioners' request for an evidentiary

hearing on that matter. See *United States* v. *Doolittle*, 507 F. 2d 1368, 1370-1371 (C.A. 5); *United States* v. *Quintana*, 508 F. 2d 867 (C.A. 7); *United States* v. *Bohn*, 508 F. 2d 1145 (C.A. 8), petition for a writ of certiorari pending, No. 74-951; *United States* v. *Ramsey*, 503 F.2d 524, 526, n. 4 (C.A. 7).

Nor is there a conflict among the circuits, as petitioners contend (Pet. 10). In both *United States* v. *Robinson*, 468 F. 2d 189 (C.A. 5), and *United States* v. *Bowdach*, 474 F. 2d 812 (C.A. 5), upon which petitioners rely, the Fifth Circuit remanded for evidentiary hearings only because the question of the procedures followed by the Justice Department in authorizing applications for electronic surveillance was raised for the first time in the court of appeals, and the affidavits initially were filed in the court of appeals. The question whether an affidavit would have sufficed in lieu of a hearing in the first instance was not addressed.[5]

2. Petitioners next contend (Pet. 12) that the government failed to prove an offense under 18 U.S.C. 1955 because there was no showing that petitioners were participants in a single gambling business involving five or more persons, as required by 18 U.S.C. 1955(b)(1)(ii). They argue that the exchanging of line information and laying off of bets with the Wolk business, without more, is insufficient

[5] The *en banc* opinion of the Fifth Circuit in *Robinson*, remanding the case for an evidentiary hearing, is reported at 472 F. 2d 973.

to fuse them together with the Wolk business, and that the evidence only established their separate operations as individual bookmakers, an offense not punishable under 18 U.S.C. 1955.*

The court below, in an opinion upon which we rely, properly rejected this claim. It began its analysis by sketching the legislative history of the Organized Crime Control Act of 1970 in an effort to determine whether petitioners' activities—primarily "lay off" betting and the exchange of line information —fell within the statutory term "illegal gambling business." It noted that the language, "conduct, finance, manage, supervise, direct or own all or part," was substituted by Congress for the word, "participate," and that the statute by its terms required the involvement of "five or more" persons (Pet. App. A8-A9). The court concluded that Congress intended by this to exclude "such small scale operations as 'Mom and Pop' bookmaking businesses" from the ambit of the federal statute (*id.* at A9), and to limit

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* While petitioners admit that Wolk, Capra, and Fishman conducted a bookmaking business (Pet. 5), they cite evidence offered at trial in which they attempted to show that their contacts with the Wolk business did not involve exchanging of line information or laying off bets (Pet. 5-8). However, an extensive review of the evidence is not required in disposing of petitioners' present claim under 18 U.S.C. 1955, since their argument presupposes that they were exchanging line information or laying off bets with a common source (Pet. 12). Moreover, the jury, the district court, and the court of appeals all found that the evidence warranted that conclusion, and there is no cause for further review of that factual determination (Pet. App. A19-A21).

the federal interest to "large organized gambling operations" (*ibid.*). In this connection, it pointed to testimony of the Attorney General in which he referred to the fact that organized crime—a primary target of the legislation—provides services essential to the conduct of large-scale illegal gambling, "such as providing the capital needed for *'laying off'* or reinsuring bets." See Pet. App. A9. The court concluded: "A system of lay off betting constitutes the cement which can weld widely scattered operations into an effective gambling organization" (*ibid.*).

In this context, the court considered petitioners' claims of insufficiency of the evidence. A close examination of the record convinced the court that

> * * * a jury could have found that each appellant was involved in a network of gambling operations intertwined with the Wolk business to an extent sufficient to bring them within the purview of 18 U.S.C. § 1955. The activities of * * * Petrangelo * * * played a substantial part in the conduct of the Wolk book. Petrangelo aided the Wolk operation by providing a regular and consistent market for Wolk's lay off betting. * * *.
>
> The case against Schullo discloses a somewhat loose arrangement between the Wolk organization and Schullo. Schullo made at least some lay off bets with the Wolk book on a fairly regular basis and apparently also received some lay off bets from Wolk. * * * [T]he transcribed conversations * * * indicate that Schullo and the Wolk book frequently exchanged lay off bets.

> From this evidence, a jury could conclude that in providing a regular market for Wolk's lay off bets, Schullo assisted the Wolk operation in the balancing of its books on various athletic contests. As such, a jury could conclude that Schullo conducted or financed a part of the Wolk operation.
>
> Since the evidence establishes that more than five persons (including the [petitioners]) were involved in the conduct and financing of the Wolk operation, the activities of each petitioner in the Wolk gambling business fall within the reach of 18 U.S.C. § 1955. * * * [Pet. App. A10-A11].

See also *United States* v. *Schaefer*, C.A. 8, No. 73-1506, decided January 3, 1975, slip op. 6-11; *United States* v. *Bohn, supra; United States* v. *Brick, supra*, 502 F. 2d at 224-225; *United States* v. *DeCesaro*, 502 F.2d 604, 611 (C.A. 7); *United States* v. *McHale*, 495 F. 2d 15, 18 (C.A. 7); *United States* v. *Sacco*, 491 F. 2d 995, 1003 (C.A. 9); *United States* v. *Ceraso*, 467 F. 2d 653 (C.A. 3). Cf. *Iannelli* v. *United States*, No. 73-64, decided March 25, 1975, slip op. 19-20 and n. 20.

Nor is there merit to petitioners' argument (Pet. 18) that such an interpretation of 18 U.S.C. 1955 renders the statute unconstitutionally void for vagueness. Such a claim has been implicitly rejected by the other courts of appeals that have interpreted the statute, in the decisions cited above, in a manner consistent with the court of appeals in this case. See also *Iannelli* v. *United States, supra.* Moreover,

specific challenges to the statute on grounds of vagueness have been expressly rejected by those courts that have addressed the question. *United States* v. *Bohn, supra; United States* v. *Sacco, supra,* 491 F. 2d at 1001-1003; *United States* v. *Riehl,* 460 F. 2d 454, 459 (C.A. 3).

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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